APPALASAMY A/L BODOYAH

v.

LEE MON SENG

HIGH COURT MALAYA JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 23-135-1990]
6 MAY 1996

DAMAGES: *Personal injuries - Amputation of arm - Assessment of damages, principles and considerations - Function of damages in tort - Public policy considerations, whether relevant - Whether tort victim entitled to seek best medical facility and opinion - Whether entitled to electronic artificial arm or mechanical artificial arm.*

DAMAGES: *Quantum - Pain and suffering - Loss of amenities - Quantum for artificial limb - Loss of earnings - Reliance on income tax assessments, whether conclusive.*

TORT: *Damages - Amputation of arm - Pain and suffering - Loss of amenities - Quantum for artificial limb - Loss of earnings.*

This was an application by the plaintiff in a running down action for damages for the injuries he sustained, including the loss of his right arm. It was mutually agreed between the plaintiff and the defendant that liability would be equally apportioned. Special damages were also agreed upon, ie, at the sum of RM13,085, and an award to that effect was handed down. At the trial, only issues on the quantum of the following heads of damages arose for decision: (1) damages for pain and suffering, and loss of amenities; (2) damages for artificial limbs; and (3) damages for loss of past and future earnings.

Held:

[1] The loss of an arm is said to be of greater disability than the loss of a leg.

[2] Awards by the Courts must be realistic and must keep up with the times, especially when the purchasing power of the Ringgit has seen better days. Consequently, the sum of RM60,000 was awarded to the plaintiff for pain and suffering, and for loss of amenities.

[3] The function of damages in tort is purely to put the plaintiff in the position he would have been in had the tort not been committed. And this can only be achieved through a reasonable award of damages.

[4] Public policy considerations are not relevant factors in the assessment of damages. They should not be used as barometers in assessing damages. Large awards motivated by sympathy towards an injured plaintiff should

not be encouraged; reasonably fair awards supported by evidence should be the correct guideline to follow in assessing damages.

[5] The victim of a tortious act is entitled to seek the best medical facility and the best medical opinion in order to put him back in his original position as though the tort had not been committed. Thus, the plaintiff was awarded the sum of S$132,000 as the cost of acquiring and maintaining an electronic artificial arm.

[6] In assessing damages for loss of earnings, reliance on assessments of income tax can never be conclusive. They cannot be used to gauge the actual earnings of a plaintiff without details of any deductions incurred by him. Thus, for loss of past earnings the plaintiff was awarded the sum of RM51,000 (being half of the actual award of RM102,000 since liability was agreed at 50-50). For loss of future earnings, an award of RM35,400 was given (being half of the actual award of RM70,800).

[7] Interest on special damages and loss of past earnings was at 4% per annum form the date of the accident to the judgment date. No interest was given on loss of future earnings. For pain and suffering, and loss of amenities, interest was awarded at 8% per annum from the date of the service of the writ to the judgment date.

[Application allowed. Damages awarded.]

Cases referred to:

Baskaran v. Techeera (M) Sdn. Bhd. [1992] MMD April 461 ***(refd)***
Wong Yee Cheong & Anor. v. Toh Seng Chuan [1988] 2 CLJ 624 ***(refd)***
Phuah Jee Suan v. Nila Vasu Pillai [1973] 1 MLJ 186 ***(refd)***
Wong Tin Vui v. Patrick Midok & Anor [1975] 2 MLJ 260 ***(refd)***
Lee Yew Hoe v. Lee Bock Huat [1980] 2 MLJ 271 ***(refd)***
Liong Thoo v. Sawiyah & Ors. [1982] 1 MLJ 286 ***(refd)***
Ang Tiong Seng v. Goh Huan Chir [1970] 2 MLJ 271 ***(refd)***
Geetha v. Hong Kong Teakwood Works (S) Pte Ltd. [1992] 1 SLR 920 ***(refd)***
Ngooi Ku Siong v. Aidi Abdullah [1985] 1 MLJ 30 FC ***(foll)***
Ong Ah Long v. Dr S Underwood [1983] 2 MLJ 324 ***(cit)***
Udale v. Bloomsbury Area Health Authority [1983] 2 All ER 522 ***(refd)***
Azman Kasri & Anor. v. Md Isa Endut & Government of Malaysia [1988] 2 CLJ 743 ***(foll)***
Yeap Cheng Hock v. Kajima Taisei Joint Venture [1973] 1 MLJ 230 ***(refd)***
RJ McGuinness v. Ahmad Zaini [1980] 2 MLJ 304 ***(refd)***
Lee Boon Kiat v. Ng Sing [1982] 1 MLJ 229 ***(refd)***
Chong Sow Ying & Anor. v. Official Administrator [1984] 1 MLJ 185 ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss 28A (2)(c)(ii), 28A (2)(d)(ii)

Other sources referred to:

The Medical Assessment of Injuries for Legal Purposes, Arnold Mann, 2nd Edn., pp. 278, 279

For the plaintiff - N. Jegatheeson; M/s. John Ang & Jega
For the defendant - R.K. Menon; M/s. R.K Menon & Co.

JUDGMENT

Abdul Malik Ishak J:

The parties agreed mutually that liability would be equally shouldered at 50-50 and an order to that effect was made. The special damages too were agreed by the parties at RM13,085 and, consequently, an order reflecting that award was handed down. At the trial proper only three (3) issues had to be decided and evidence was led by the plaintiff's solicitors in that direction. The three disputable issues were on quantum and for convenience they may be listed as:

(1) Quantum for pain and suffering and loss of amenities;

(2) Quantum for artificial limb for the future; and

(3) Loss of earnings past and future.

Quantum for pain and suffering and loss of amenities

It was not disputed that the plaintiff met with a road accident on 28 February 1989 whilst driving motor van JAV 2252 and he sustained severe injuries. Dr. Annamalai's report in the agreed bundle marked "IDP" at page 1 listed the injuries sustained by the plaintiff in the following terms:

(1) Crush injury right elbow - lacerated wound with skin loss (15cm x 8cm), compund fracture of right humerus with neuro-vascular deficit (median nerve hypoasthesis and dislocation of left elbow - with foreign bodies);

(2) Multiple abrasions; and

(3) Lacerated wound dorsum of right wrist.

Dr. Annamalai further stated in his report that the plaintiff was treated adequately for the above injuries and the plaintiff was discharged on 23 February 1989. The magnitude of the plaintiff's injuries were adequately set out in the medical report of Dr. Thambyrajah dated 29 April 1989 which formed part and parcel of the agreed bundle in exhibit "IDP" from pages 3 to 5. In that medical report, Dr. K. Thambyrajah noted the deteriorating condition of the plaintiff's right hand right to its minute detail in these words:

> On admission his general condition was poor. He was in impending shock. He was resuscitated, given analgesics and antibiotics.
>
> His main injury was in the right arm. There was a large laceration on the anterior aspect of the right elbow with surrounding skin deeply abraded. The right elbow joint was dislocated and the blood vessels and nerves anterior to the elbow joint were damaged. All veins running anterior to the elbow joint were completely

avulsed and there was a traction injury to the brachial artery. The brachial artery was itself in spasm. The median nerve was stretched and contused. It was contaminated with mud. The medial muscles of the forearm were also avulsed from their origin from the humerus. There was no radial pulse felt. Sensation was absent in the median nerve distribution. The circulation to the fingers were equivocal. There was some capillary return but the fingers were reasonably warm and not entirely cold. He was taken to the Operating Theatre on the same day and the following injuries were noted:

(1) The right elbow had suffered a compound dislocation. The wound was grossly contaminated with earth.

(2) The brachial artery was in continuity but it had been contused and had suffered a traction injury. The artery itself was in spasm.

(3) All veins running anterior to the elbow were completely avulsed.

(4) The median nerve was badly contused and contaminated and had also probably suffered traction and abrasion injury.

(5) There was a 4 cm diameter laceration on the dorsum of the right wrist.

(6) There was dirty wound on the dorsum of the right forearm measuring 8 cm in diameter.

(7) There were multiple abrasions on the dorsum of the hand and forearm.

Meticulous debridgement of the wound was done and the elbow was reduced. The brachial artery was divided and blood flow was re-established and the artery was repaired. The wounds on the dorsum of the forearm and wrist were debridged and sutured. The median nerve was cleaned. Following surgery the circulation of the fingers improved and he was admitted to the ward and analgesics and antibiotics and resuscitatory measures were continued. On 24 February 1989 it was observed that there was no sensory activity in the hand. There was capillary return in the digits but the radial pulse was not felt. He had active flexion of the ulnar three fingers. On 25 February 1989 his neurological status was still the same. On 26 February 1989 the circulation was not as good as the previous day and on the evening of 26 February 1989 it was found that he had no movements at all in his fingers and there was very poor capillary return and on the tips of his fingers. He was not able to move his fingers at all. He was scheduled for surgery and the right forearm was explored again. On this occasion it was found that the radial artery had got occulded again and the circulation in the forearm was poor. The radial artery was reexplored, circulation reestablished and a catheter was placed insight to infuse the area with Heparin. With this treatment the capillary return improved but there was no sensory return. He developed fever and there were accompanying evidence of infection in the elbow area. Over the next few days the situation deteriorated and he was advised amputation on 2/3/89. On this day the right arm was amputated 4 inches above the lower end of the humerus. The wound was closed.

In the post operative period his temperature settled and the wound was healing fairly well and he was discharged from the hospital on 4 March 1989.

The gruesome detail of the pain and suffering which the plaintiff went through cannot be imagined. It was, at best, an experience which no mortal should undergo. Upon admission, the plaintiff underwent surgery to save his right arm. This proved to be ineffective. On 26 February 1989 the condition of the plaintiff's right arm deteriorated further and further surgery was carried out. The next few days saw worsening condition of the plaintiff's right arm which finally culminated in a right arm amputation above the elbow - to be precise four (4) inches above the lower end of the humerus.

On 22 May 1992, the plaintiff was examined by the defendant's specialist in the person of Dr. JR Raj who noted, *inter alia*:

(1) an above elbow amputation;

(2) a 14 cm U-shaped scar over stump of right arm, and a 10 cm medial extension scar; and

(3) the right hand was the dominant hand, and the plaintiff had to learn the hard way of using his good left hand to take over the functions of daily living like bathing, eating, writing and other activities.

It must be borne in mind that the plaintiff did not lose his right arm immediately after that road collision but instead he lost it after nine (9) lingering days of suffering and after three (3) operations which included the surgery to amputate his right arm. It appears and it is the suggestion of Arnold Mann in his book entitled "*The Medical Assessment of Injuries for Legal Purposes*" (2nd edition) that the lost of an arm is said to be of greater disability than the loss of a leg. This was what the learned author said (at page 278):

> Where amputation is performed so that an above - elbow prosthesis can function, the disability is 95 percent.

Whereas at page 279, the learned author was reported to have said that the:

> Above - knee amputation represents a loss of 90 percent of the function of the leg ...

Indeed the physical incapacity of the plaintiff was accentuated by Dr. JR Raj who in his report categorically stated that the plaintiff would be unable to drive or ride motorcycle as before.

In *Baskaran v. Techeera (M) Sdn. Bhd.* [1992] MMD April 461, Abdul Malek Ahmad J (now JCA), awarded RM50,000 for severance of the right arm at 5 cm distal to the elbow joint. This award was handed down by the learned Judge on 13 December 1991.

In *Wong Yee Cheong & Anor. v. Toh Seng Chuan* [1988] 2 CLJ 624, Mohd. Eusoff Chin J (now Chief Justice of the Federal Court), awarded RM50,000 for amputation of right arm at mid-arm level (above the elbow).

By comparison, these two cases were decided some years ago when the value of the ringgit was stronger then. Awards by the Courts must be realistic and keep up with the times especially when the purchasing power of the ringgit has seen better days (*Phuah Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186, 188 CA; *Wong Tin Vui v. Patrick Midok & Anor.* [1975] 2 MLJ 260; *Lee Yew Hoe v. Lee Bock Huat* [1980] 2 MLJ 271; *Liong Thoo v. Sawiyah & Ors.* [1982] 1 MLJ 286). In *Baskaran*, the amputation was below the elbow joint - to be precise 5 cm distal to the elbow joint. Here, the plaintiff's right arm was amputated 4 inches above the lower end of the humerus. In fact when the plaintiff took out his artificial limb with the help of his wife in open Court, I saw the unsightly amputation and I noted that it was "potongan above the elbow tinggal stump sahaja."

In *Ang Tiong Seng v. Goh Huan Chir* [1970] 2 MLJ 271, for the left arm amputation, the Singapore High Court awarded S$25,000 which was drastically reduced by the Court of Appeal to S$17,500. In *Geetha v. Hong Kong Teakwood Works (S) Pte Ltd.* [1992] 1 SLR 920, for traumatic amputation of left upper arm about the wrist joint and many intervening bones and structures were missing, the Singapore High Court awarded S$35,000. Using these comparables as useful guidelines as what was suggested by *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30 FC, I awarded RM60,000 to the plaintiff under this head. On reflection, I thought the award was on the lower scale bearing in mind that the plaintiff had fever and "accompanying evidence of infection to the elbow area". It was only during the post-operative period that the fever settled to normal until the plaintiff was finally discharged from the hospital on 4 March 1989.

Cost of artificial limb

Having lost the right arm the plaintiff was certainly entitled to an above elbow prosthesis that can function to his advantage. When the plaintiff attended Court he was using an artificial **mechanical** arm which was fitted at a cost of RM3,500. The defendant's specialist in the person of Dr. J.R. Raj did say in his report that the artificial **mechanical** arm currently used by the plaintiff was heavy and bulky which can open and close mechanically about 3 cm only, consequently, putting the plaintiff as a user to a great deal of disadvantage in that he would have very poor control of simple movements. What is pertinent in this. Dr. J.R. Raj admitted that the artificial **mechanical** arm was purely cosmetic in that the plaintiff was able to hold an object about 3 cm in diameter or less when it was placed directly into it. There was in fact minimal function of the artificial **mechanical** arm for the plaintiff's daily living activity. Though Dr. J.R. Raj did say about the availability of the more sophisticated artificial limbs yet he was cautious when he said that they were very expensive and get damaged or spoilt very easily.

The plaintiff was duly examined by an artificial limb specialist in Singapore as reflected at pages 14 to 16 of the bundle marked as "IDP". In his report Mr. Rajaratnam recommended that the plaintiff be fitted with an above elbow **electronic hand** complete with an electronic hook. He estimated the cost of one such fitting to be in the region of S$9,000 to S$10,500. He even recommended that the plaintiff be supplied with two (2) artificial limbs. He felt that the plaintiff requires to change the artificial limb once in every six (6) years until the plaintiff reached the age of 65 years to 70 years. In monetary value, Mr. Rajaratnam estimated that the plaintiff would incur the following in fitting an above elbow electronic hand complete with an electronic hook:

(1) costs of artificial electronic arm at	...	S$126,000
(2) estimate of repairs and servicing at	...	S$ 6,000
		S$132,000

Through his solicitors Messrs John Ang & Jega, the plaintiff obtained a report from Teh Lin Prosthetic & Orthopaedic Co. Sdn. Bhd. a company based at Taman Maluri, Kuala Lumpur as reflected at page 3 of the agreed bundle at "IDPT" and in that report it was estimated that the plaintiff requires five (5) above elbow **electronic artificial limbs** once in every six (6) years with an estimated costs of RM103,880 including the necessary repairs and services.

Messrs R.K. Menon & Co. had also acted prudently for the defendant and through the initiative of Mr. R.K. Menon himself a report from Teh Lin Prosthetic & Orthopaedic Co. Sdn. Bhd. was obtained as can be seen at pages 19 and 20 of "IDP" where for an estimated cost of above elbow **mechanical functional hand** a sum of RM24,470 was listed. Mr. R.K. Menon argued systematically and drove home a point that there are limb centres available in Malaysia not only in Kuala Lumpur but also in Johor Bahru and, in the circumstances, there was no need to refer to the report by Mr. Rajaratnam from Singapore. It was his submission that this Court should confine itself to the report from Teh Lin Prosthetic & Orthopaedic Co. Sdn. Bhd. and because of the availability of such limbs in the country, it was said that the plaintiff should **"Buy Malaysia"** rather than go overseas. By implication and inference, Mr. R.K. Menon was asking this Court to adopt the concept of buying Malaysian products and not to look to Singapore whilst assessing the quantum of the artificial limbs for the plaintiff. My attention was drawn to another report prepared by Teh Lin Prosthetic & Orthopaedic Co. Sdn. Bhd. dated 15 July 1992 at pages 22 and 23 of "IDP" where the report took into account the cut off age of the plaintiff at 55 years as opposed to the earlier report at pages 19 and 20 of "IDP" where the plaintiff's estimated life span was said to be at 65 years, to drive home the message that the above elbow **mechanical functional hand** would merely cost RM4,000 and that the plaintiff would only

need three (3) changes. Thus, the purchase of three artificial **mechanical hands** would be in the region of RM12,000. After having taken into account other incidentals, the final figure came to RM17,870. This was the figure which Mr. R.K. Menon suggested to me.

Mr. R.K. Menon argued that the plaintiff did not show to this Court as to why he needed an electronic artificial hand as compared to a mechanical one which he had it fitted to himself at the date of the hearing. A question was also posed as to why the plaintiff did not fit an electronic hand if he actually needed it. There was no impediment for the plaintiff to have fitted an electronic hand except perhaps the expense that might be incurred in purchasing for that item. Consequently, I was urged to merely make an order for the cost and maintenance of a **mechanical artificial arm** until the plaintiff reached the prime old age of 55 years old.

Next, it was argued that Mr. Jegatheeson, the learned Counsel for the plaintiff, had conveniently taken the life span of the plaintiff at 65 years without making the necessary deductions for unforeseen eventualities or unforeseen contingencies like what was done in the case of *Wong Yee Cheong & Anor. v. Toh Seng Chuan* [1988] 2 CLJ 627. In that case the cut off age was taken at 62 years and one-third was deducted for contingencies. It was submitted that the same approach should be adopted here.

All said and done, the crucial issue for the determination of this Court was to consider whether the plaintiff was entitled to an electronic artificial hand or a mechanical artificial arm.

I am acutely aware that in running down cases, the plaintiff would surely make an attempt to reap harvest out of his misfortune. Put differently an aggrieved plaintiff would usually make a fortune out of his own misfortune. But that is not the correct approach to adopt. No one likes to lose a dominant arm that would be of great use to oneself. Thus, one must not forget the general rule that the function of damages in tort actions is purely to put the plaintiff in the position which he would have been in had the tort not been committed in the first place and this can only be done through a reasonable award of damages. Syed Agil Barakbah FJ in *Ong Ah Long v. Dr. S. Underwood* [1983] 2 MLJ 324 at page 334 compartmentalised the question of damages in its correct perspective when his Lordship said in erudite terms that:

> Damages for personal injuries are not punitive and still less a reward. They are simply compensatory that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate.

On the other hand, public policy consideration is not a relevant factor to take into account when making an assessment of damages. The concept of public policy is always double-edged. An aggrieved plaintiff in a tort action would benefit by a high award but the insurance companies would retaliate by

increasing insurance premiums which would be borne by the general public and which would in turn be said to be against public policy. Exceedingly high awards would not put the country in good stead. If the consequential effect of a high award would promote good and careful driving among Malaysians that would indeed be beneficial to the general public but if it results in the sprouting of tortious actions in Courts throughout the country on filmsy grounds then it would be against public policy. High awards would also encourage sham claims. In *Udale v. Bloomsbury Area Health Authority* [1983] 2 All ER 522, the principles of public policy did not preclude an award of damages for lost income and also for pain, suffering, inconvenience, anxiety and the disruption to the family's finances caused by the unexpected pregnancy. In my judgment, public policy consideration should not be used as a barometer in assessing damages. Large awards motivated by sympathy towards an injured plaintiff should not be encouraged but reasonably fair awards supported by evidence should be the correct guideline to adopt in assessing damages.

Reverting back to the issue at hand, there was hardly any disparity in the cost of an electronic arm in Singapore at S$10,500 as compared to the one in Malaysia at RM18,000. The differences between both these estimates centred mainly in two areas:

(1) Mr. Rajaratnam suggested 12 sets meaning 2 sets for every 6 years;

(2) Teh Lin Prosthetic & Orthopaedic Co. Sdn. Bhd. suggested 1 set for every 6 years.

Preference should be focussed to the report prepared by Mr. Rajaratnam as, firstly, he had examined the plaintiff and, secondly, all artificial limbs require periodical services and repairs and during that period the plaintiff cannot be asked to do without it. Mr. Rajaratnam in his report emphasised a very salient point to the effect that it was a practice all over the world to supply two artificial arms for every 6 years or less and this practice was never challenged at all by the defendant through his solicitors. In the circumstances, I have no choice but to prefer Mr. Rajaratnam's report and awarded the plaintiff the following awards:

(1) costs of artificial electronic arm at S$126,000; and

(2) estimate of repairs and servicing at S$6,000.

Adding up these two awards a grand total of S$132,000 was awarded to the plaintiff under this head. This award must be computed in Singapore currency or an equivalent Malaysian currency. It must be emphasised that as a victim of that tortious act the plaintiff was entitled to seek the best medical facility and the best medical opinion in order to put him back to his original position as though he had not met with an accident. Surely this is the best approach

to be adopted and such an approach would be reflected in monetary terms that might compensate the plaintiff for the loss of his dominant right arm. For comparables reference may be made to *Wong Yee Cheong & Anor v. Toh Seng Chuan (supra),* where Mohd. Eusoff Chin J (now Chief Justice of the Federal Court) awarded RM79,960 for costs of artificial limbs and renewals of replacement parts. Again his Lordship Mohd. Eusoff Chin J (now Chief Justice of the Federal Court) in *Azman bin Kasri & Anor. v. Md. Isa bin Endut & Govt. of Malaysia* [1988] 2 CLJ 743 gave reasonably high awards for fitting artificial limbs together with the incidental expenses. Briefly, the facts in *Azman bin Kasri (supra)* were that the first plaintiff there, who was a student aged 14 at the time of the accident, was knocked down from the rear by a military truck driven by the first defendant at about 4.45 p.m. on 11 February 1982 while cycling. The injuries sustained were described as (a) crush injury of left leg; (b) 6 inches laceration wound vertical exposing the lower end of left femur and upper end of left tibia and fibula; (c) dislocation of left knee with separation; and (d) lateral popliteal nerve partially torn near neck of left fibula. The left leg was subsequently amputated above the knee. His Lordship after examining the relevant authorities proceeded to assess damages and made the following awards:

(1) cost for fitting artificial limb and for the future at	...	RM33,600
(2) cost for future renewal of consumptive items at	...	RM20,640
(3) Travelling expenses for servicing of artificial limb (3 trips per year at RM100 per trip for 35 years) at	...	RM10,500
		RM171,480

Mr. Rajaratnam in his report did not advert to travelling expenses from Johor Bahru to Singapore for the plaintiff to seek servicing of his artificial electronic arm and fortunately for the defendant this was not sought for by the plaintiff. Had the plaintiff sought for these travelling expenses, I would not hesitate to make the awards following his Lordship Mohd Eusoff Chin J (now Chief Justice of the Federal Court) in the case of *Azman bin Kasri (supra)*. It is germane to note that way back in 1973, Syed Agil Barakbah J (as he then was) in *Yeap Cheng Hock v. Kajima Taisei Joint Venture* [1973] 1 MLJ 230, allowed the costs of replacing a new limb from time to time and also the cost of having an extra artificial limb. Again in *R.J. McGuinness v. Ahmad Zaini* [1980] 2 MLJ 304 and in *Lee Boon Kiat v. Ng Sing* [1982] 1 MLJ 229, 232, the Courts there allowed the costs of artificial limbs.

Loss of earnings

The plaintiff gave evidence. It was established that the plaintiff started his business as a wholesale dealer in curry powder and other condiments from the time he registered his business under the style of Sri Samy 'S' on 9 September 1988. The business entailed travel and carrying of heavy items. Initially the plaintiff was ambitious and he carried on the business wholly on his own. His wife, who gave evidence, was then working separately in an electronic firm and was then earning RM450 per month. The road accident that happened on 22 February 1989 prevented the plaintiff from driving the van in the course of conducting his business.

There was evidence that after the accident particulary for six (6) months the plaintiff did not conduct any business although he admitted that his shop was opened. From August 1989, the plaintiff's wife stopped work in the factory and assisted in running the plaintiff's business. From that date onwards both of them carried out the business together. The plaintiff's wife acquired a driving licence and drove the van - basically she did the heavier work which included, *inter alia*, carrying heavier things.

The plaintiff testified and gave an estimation of his wife's contribution to the business as RM1,200 per month. It was in evidence that if the plaintiff employed someone else to do the wife's work, he would have to pay the same amount. Ever since the accident, the husband and wife team had managed the business. The income tax was paid by the plaintiff. Seven assessments for the years of assessments from 1987 to 1993 were tendered and marked as exhibits at the behest of the defendant's solicitors as D1A to H. Exhibits D1A, D1B and partly D1C are irrelevant as they showed the plaintiff's income prior to his setting out his own business in September 1988. Only exhibit D1C (a small part) to D1H are relevant and, consequently, these will be referred to in this judgment. It must be observed that all assessments were meant for the previous years' earnings. Thus, a 1988 assessment was meant for earnings earned in 1987.

A brief analysis of the assessments will now be undertaken.

(1) The 1989 assessment at exhibit D1C was meant for income earned in 1988 which income was listed as RM7,006. However, since the plaintiff started his business on 9 September 1988, this assessment was unsafe to rely upon as a barometer to show the plaintiff's total income for the whole year of 1988. By necessary inference, the assessment related to the plaintiff's income for the period between 9 September 1988 to 31 December 1988 and, consequently, the average monthly income of the plaintiff in the business for that period was confined to only four (4) months. Thus, RM7,006 divide by 4, one would get a figure of RM1,751.50 per month.

(2) The 1990 assessment at exhibit D1D was for income earned by the couple in 1989. Exhibit D1D showed an income of RM16,686 which can be computed to be RM1,390.50 per month. As stated earlier the plaintiff met with an accident on 22 February 1989 and he stopped work until August 1990 when his wife joined him. Thus, from August 1990 onwards the income was a joint income between the plaintiff and his wife.

(3) The 1991 assessments at exhibits D1E and D1F were meant for income derived and earned by the couple in 1990. One can easily take note that there are two assessments. But the crucial assessment would be the revised assessment known as Taksiran Yang Dikurangkan in Form JR (1) which showed that the couple earned RM12,860; on monthly basis it can be computed at RM1,071.60 per month.

(4) The 1992 assessment at exhibit D1G was for income earned in 1991 by the couple and the figure showed RM18,957. On monthly basis the figure came to RM1,579.75 per month.

(5) The 1993 assessment at exhibit D1H for income earned by the couple in 1992 was listed at RM18,152. On monthly basis the figure came to RM1,512.60.

But the plaintiff in his testimony testified that he earned an average income of RM1,400 per month and that since August 1989 when his wife combined her resources with him, he roughly estimated that if he were to employ a helper to do his wife's work he would have to pay RM1,200 to that helper. In the circumstances, the plaintiff estimated his wife's contribution at RM1,200 per month. It is apparent that reliance on assessments of income tax can never be conclusive. Shaik Daud J (now JCA) in *Chong Sow Ying & Anor. v. Official Administrator* [1984] 1 MLJ 185 on the same subject matter had this to say:

> It is conceded that there is no evidence of deceased's actual monthly earnings and the Court has to rely on the evidence of his widow on this. Although the widow was subjected to lengthy cross-examination by Counsel she appeared not to be shaken. The defence produced the deceased's income tax assessment for 1973 which showed that he was assessed $501.08 and from this it was deduced that his net average earnings could not be more than $800 per month. With respect I am of the view that merely producing an income tax assessment one cannot show the actual earning without more details of deductions and so on. Defence contention that deceased could not have given his wife more than $300 per month also cannot hold water because with $300 per month it would be impossible for her to engage a servant, keep house and be able to save. In view of this, I am more inclined to accept her evidence that she was getting around $1,000 per month. Evidence of PW2 Kassim bin Abdullah who worked for deceased plaintiff showed that deceased's earnings would be more than the $800 as contended by defence. PW2's evidence on this has not been challenged or

broken, on the contrary, his cross-examination has rather strengthened the plaintiff's contention. I am satisfied that PW1's evidence on the amount she used to receive from her late husband has not been disproved. In any case, I am also of the view that it is most unreasonable not to accept this figure in view of the style of living by plaintiff and his family and the type of business deceased was engaged in.

Applying *Chong Sow Ying's* case *(supra)*, it is my judgment that the assessments in exhibits D1C to D1H cannot be used as guidelines to gauge the actual earnings of the plaintiff without details of any deductions incurred by him. That the plaintiff's wife assisted the plaintiff since August 1989 was never challenged at all. She testified that had she continued working in the factory she would be earning RM800 to RM900 per month. She testified further that her husband used to have a hired help - a driver to be precise, but her husband had terminated the driver's employment.

It was impressed upon me by Mr. R.K. Menon that the assessments of the income tax showed that the plaintiff did not suffer from loss of earnings. On the contrary, it was submitted that there was a factum of increased earnings experienced by the plaintiff in his business after the amputation of his right arm. In my judgment the increased earnings were entirely due to the agility of the plaintiff's wife in managing the affairs of her husband's business. The plaintiff could not drive a motor vehicle nor ride a motorcycle in his present predicament. It was his wife who drove the van, carried heavy items that did the trick.

In the final analysis it is my duty to estimate the loss of earnings incurred by the plaintiff taking into account the demeanour of the plaintiff and his wife while they gave evidence especially their uprighteousness and their forthcoming attitude. Under s. 28A (2)(c) (ii) of the Civil Law Act, 1956 it is enacted that in awarding damages for loss of future earnings the Court shall take into account only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future. Thus, applying the law to the facts of the present case, it is my judgment that the plaintiff earned RM1,400 per month at the time of the accident. The income tax assessments for the years 1990 to 1993 when viewed in the context of the uncontroverted testimonies of the plaintiff and his wife, would lead to an inescapable conclusion, which I did, that the plaintiff cannot carry on the business on his own without his wife's help and, consequently, the income earned was substantially contributed to by the wife's hard work. In my judgment, the monthly loss would be based on RM1,200 per month being the sum which the plaintiff would have paid to a helper in the event his wife did not assist him full time in his business and this amount should be used as the multiplicand. It is enacted in s. 28A (2)(d) (ii) of the Civil Law Act, 1956 that in assessing damages for loss of future earnings the Court shall take into

account that in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2. Now, since the plaintiff was 31 years of age at the time of the accident, applying the formula prescribed by that section, the calculation would be as follows: 55 minus 31 years equals 24 divide by 2 equals 12 years (144 months). Thus, the calculation to compute the loss of earnings would be in this fashion.

Past loss of earnings

From 22 February 1989 (the date of the accident) to 21 March 1996 (the date wherein Mr. Jegatheeson prepared his written submission), it came to 7 years 1 month which is equivalent to 85 months. Using RM1,200 as the multiplicand, the calculation would be:

85 months x RM 1,200 = RM 102,000

Since liability was agreed at 50-50, the award under this head was reduced accordingly and it came to RM 51,000.

Future loss of earnings

It would be computed in this fashion:

144 months - 85 months = 59 months.

Again, using RM1,200 as the multiplicand the calculation would be as follows:

59 months x RM 1,200 = RM 70,800

In view of equal apportionment of liability at 50-50, the award would be reduced proportionately to RM 35,400.

To recapitulate, the awards were handed down in the following terms:

(1) Special damages : RM 13,085

(2) Pain and suffering and loss of amenities : RM 60,000

(3) Artificial limb:

(a) costs of artificial electronic arm : S$126,000

(b) estimate of repairs and servicing : S$ 6,000

S$132,000

It must be stressed that this figure should be paid either in Singapore currency or its equivalent in Malaysian currency.

(4) Loss of earnings

(a) Past loss of earnings: RM 51,000

(b) Future loss of earnings: RM 35,400

Interest on special damages and past loss of earnings would be at 4% per annum from the date of the acident to the date of the judgment. No interest would accrue for future loss of earnings. As for general damages, particularly for pain and suffering and loss of amenities, an interest at 8% per annum from the date of the service of the writ to the date of judgment was ordered. Finally, costs of this action to be taxed or agreed upon.

Reported by Gan Peng Chiang